



STATE BOARD OF EQUALIZATION

October 23, 1969

M--- E. H--- & Associates
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--- ---, CA XXXXX

SR -- XX XXXXXX

Dear Mr. H---:

This is in reply to your letter of July 30, 1969, in which you raise a question as to the application of the sales tax in certain transactions involving large works of art created for specific landscape designs.

We understand that you represent several sculptors that have made a specialty of creating large fountains, large metal sculptures, sculptured cement walls, etc. They are commissioned works with many months of effort put into exact designing so that the finished piece will be harmonious with the landscape and surroundings.

These commissioned pieces are designed so that they, when installed, become a permanent part of the landscape. In other words, the fountains are welded in place and set in cement. The sculptures and concrete sculpted walls are permanently placed by welding them to a concrete base or existing walls and usually set in cement. In most cases they cannot be moved without partially destroying the works themselves.

You suggest the following example:

“The artist enters into a contract with a corporation to design and construct a major sculpture for the terraced entrance outside their building. These are normally lump sum contracts for the designing, construction and installation of the piece. And they are normally in to parts, one for the designing, and one for construction and installation.

“The project may have a total budget of \$35,000 for this sculpture. The artist’s design fee may be 10% or \$3,500, and credited to the total budget if his designs and model are approved by the architect and client.

“The artist may then work from a month to a year to finally obtain the approval of the design and model by the architect and client. If the architect and client do not approve the design/model the artist receives \$3,500 and the matter ends. If they do approve, he then proceeds to construct the piece from the model and permanently install the sculpture.

“For this example, I will say that the actual material costs for the construction of the sculpture are \$15,000. His costs in moving the piece from his studio and installing it on the site are \$2,000, leaving the artist a total of approximately \$18,000 for a year to two years of labor.

“My question is this: On what portion of this total must the artist collect sales tax from the client?”

Where the design is not accepted, no tax applies because there is no sale of tangible personal property. Where the design is accepted and the work is constructed and installed, the application of the tax is more difficult of determination, depending, as it does, on the particular facts of the particular case.

The legal distinction of importance in determining how the tax applies is the distinction between “materials” and “fixtures” as made in our ruling 11, copy of which is enclosed. Under the circumstances you describe, the sculptors would be consumers of “materials” (and tax would apply only to the sale of such materials to the sculptors) and they would be retailers of “Fixtures” which they furnish and install (and tax would apply to the retail selling price of the fixtures).

The difficulty, of course, is in distinguishing between “materials” and “fixtures”. By way of example, we have said, in the case of Mr. D---, that bronze sculptures which comprise center place deflectors in large decorative water fountains can be “materials”. In the specific case ruled upon, the sculpture was attached to the base of the fountain by welding to a metal frame embedded in concrete. In some cases piping was incorporated into the sculpture and was connected to the local water supply piping. The sculptures ranged in size from 9’x4’x4’ to 32’x13’x11’ and weighed from 500 lbs. to 3-1/2 tons. They were completely manufactured in the sculptor’s shop. We said:

“Inasmuch as the concrete foundations are improvements to realty and the sculptures are designed and installed as an integral part of such realty, it is our opinion that such sculptures constitute materials under ruling 11.”

In contrast to this decision, we have said that certain mosaic tile paintings were “fixtures”. The mural was enclosed in an iron frame. It was then attached to the wall of the building by bolts. The bolts were located within the picture in unobtrusive areas. No bolt holes were made through pictures of figures of other important items. The mosaic was unfinished as to the openings for the bolts, which were inserted into the wall through these openings. After the picture was fastened to the wall, the bolt ends were covered with cement and inlaid with special prepared tile. To have removed one of these mosaics would have destroyed its value. We said:

“If the taxpayer created the art form (mosaic tile mural) by applying the small items of tile pieces to a wall or other part of a building, or by printing or drawing it upon the wall so that it becomes an integral or inseparable part of the building, he would be the consumer of the materials used. [But where] the taxpayer creates the complete art item and then attaches it to a wall or to the part of the building by means of bolts in a manner not making it an integral or inseparable part of the building, [he is] a retailer of his finished work. Inasmuch as the completed product does not lose its identity as an item of property necessary to the wall of the building, it becomes a “fixture” upon placement.”

Some outdoor advertising signs, the large self-supported ones, are regarded as structures, and the persons constructing them are regarded as consumers of the “materials” which go into them. Those attached to buildings are generally regarded as “fixtures”.

Ruling 11 says that “materials” as used therein means tangible personal property which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the completed structure. “Fixtures” means things which are accessory to a building in which do not lose their identity as accessories when placed or installed.

The critical distinction is not whether the property in question is to be permanently implaced, or whether the property would be damaged somewhat upon removal, nor is the size of the item critical. Rather, the distinction seems to be as to what extent the property “loses its identity” upon incorporation into a structure. Unless a work of art itself qualifies as a structure, as some kinds of shrines might, the work must “combine” with other property and “lose its identity” to be regarded as “materials”. The bronze fountains discussed above were thought “to combine” with the foundations to become part of a completed structure. It seems to have been thought that since the fountains and the base of the fountains were connected by pipes through which water was to flow, the two elements were combined into one.

In response to your specific questions, it is not the act of permanent installation, nor the act of creating the sculpture in the studio, nor the materials in which the artist works, which determines the tax. Rather, it is what might be called the nature of the merging of the work with the place of implacement.

In terms of your specific example, the correct measure of tax would be \$35,000, less the cost of installation and less, depending upon the specific facts, the cost of transporting the work from the artist's studio to the place where the work will be installed. Section 6012 of the Revenue and Taxation Code provides that the measure of tax does not include "the price received for labor or services used in installing or applying the property sold". The application of the tax to transportation or delivery charges is outlined in our ruling No. 58, copy of which is enclosed. Paragraph (c) of this ruling would probably be applicable to the kinds of agreements entered into by your clients. Transportation charges would thus be taxable unless the transportation occurs after title to the property passes to the purchaser, the charges are separately stated, etc.

We hope that this letter will be of some guidance to you. However, since the standard set by the ruling requires a factual determination in each case and since no one kind of fact is controlling, it is difficult to generalize in this area. .

Very truly yours,

Gary J. Jugum
Assistant Tax Counsel

GJJ/vs
Enclosure